RECENT CASES.

COMMON CARRIERS.

Express Companies: As Insurers

Goods consigned to plaintiff by way of the defendant express company, arrived at their destination, an unimportant station, where the usage was to notify the consignee of their arrival instead of personally delivering them. The defendant's agent sent no notice to the plaintiff. Plaintiff's goods were stolen the same day he would have received notice of their arrival, had any been sent. *Held*, that as the negligence in not sending the notice was not the proximate cause of the loss, the Court assuming that the consignee, because of the inclement weather, would not have gone for the package had notice been sent, defendants are not liable. *Hutchison* v. *Express Co.*, 59 S. E., 949. An ordinary common carrier is responsible for goods carried, only as warehouseman after they have been at the point of destination a reasonable time. *Fenner* v. *R. R.*, 44 N. Y., 505. And some courts hold that not even notice of the arrival by the common carrier to the consignee is necessary. *Norway Co.* v. *R. R.*, 1 Gray, 263. Upon an express company, however, there is the duty laid of personal delivery, and until such delivery it is held as insurer. *American Express Co.* v. *Wolf*, 79 Ill., 430. This duty may be dispensed with by custom and usage at unimportant stations and replaced by the duty of mere notice to the consignee; but the express company is held strictly liable to give such notice in order to be relieved of its liability as insurer. *Witbeck* v. *Holland*, 45 N. Y., 13. As there was no notice given in the principal case, irrespective of whether it would have been acted on or not, it is submitted that the defendant was not relieved of its liability as insurer, and the doctrine of proximate cause on which the Court based its opinion should not have been considered at all.

CONSTITUTIONAL LAW.

The personal representative of D brought an action *in per-*

CONSTITUTIONAL LAW (Continued).

Tort on High Sea: Liability Under State Statute

sonam against B for the death of D in a collision on the high sea between the vessels of B and C, corporations located in Delaware, a State statute of which permits such an action by the personal representative of the deceased. Holmes, *J.*, *held*, that such a statute is not repugnant to the admiralty or commerce clauses of the Federal Constitution, and will be enforced as a case within the common law jurisdiction, which State statutes may control in the absence of federal legislation on the subject. *Old Dominion Line* v. *Gilmore*, U. S. Adv. Sheets, Jan. 15, 1908, p. 133.

Such an action for a maritime tort under the State law was doubted in *Butler* v. *Boston*, 130 U. S., 527; but has been since definitely established in The Corsair, 145 U. S., 336; *McDonald* v. *Mallory*, 77 N. Y., 546; and the City of Norwalk, 55 Fed. 98 (N. Y.).

CONTEMPT.

Publication of Decision

The Supreme Court of Rhode Island adjudged B in contempt for incorrectly publishing the decision of the Court, and making adverse criticisms thereon without disparaging the integrity of the Court. B pleaded that the misstatement was not intentional and the criticism not on a cause then pending. The Court *held*, that as the decision was far-reaching, such a misstatement could not be published with impunity. *In re*, Providence Journal Co., 68 Atl. 428.

Under this opinion, there would appear to be liability for any misstatement of the law whether made in the press or on the forum, whether the cause be then pending or not. At common law, one might be adjudged in contempt (1) for scandalizing the Court itself; (2) for abusing the parties concerned in the cause, or (3) for prejudicing mankind against persons concerned before the cause is heard. *Roach* v. *Garvan*, 2 Athyns, 471. This common law doctrine has been followed in some States, as in Morrill's Case, 16 Ark., 384, and Burdett's Case, 103 Va., 838; but the principal case can hardly be brought within those cases.

The general American doctrine is that no matter how defamatory of the court or the judge a publication may be, it cannot be regarded as contempt unless it be written and published with reference to a cause then pending before the court. *Ex parte*, Green, 81 S. W. (Tex.), 723; *Fellman* v. *Mercantile*, 116 La., 723; *Stuart* v. *People*, 4 Ill., 395.

CRIMINAL LAW.

The accused was informed against for robbery. The information was insufficient to charge that offense, but did charge larceny. He was tried, convicted and sentenced for robbery. *Held*, the accused, having been once in jeopardy for the offence of larceny under such information, could not be again tried therefor after reversal of the erroneous conviction of robbery. Court of Appeal of California in *People* v. *Ho-Sing*, 93 Pacific, 204.

Former Jeopardy

In *Floyd* v. *State*, 96 S. W., 125 (Ark.), the defendant was discharged on an indictment of robbery, because he had been fined before a magistrate for petit larceny based on the same facts. The Court say, "As a charge of robbery includes larceny," the defendant on the indictment of robbery would be on trial for an offense for which he had already suffered punishment.

In *Bowen* v. *State*, 106 Ala., 178, the indictment charged burglary, the jury found defendant guilty of larceny, the Court reversed the finding, because of failure to allege ownership of the property, but *held* he could be tried again for larceny.

A was convicted and sentenced for the crime of obtaining money by false pretenses in the United States Court in China, which was created by Act of June 30, 1906. The Court has jurisdiction over offenses against the laws of the United States, and when these are deficient to furnish suitable remedies, then in accordance with the common law. *Held*, the statute 30 Geo. II (1757), making this act a crime having been passed prior to the separation of this country from England, is an offense at common law within the meaning of the Act of 1906; *Biddle* v. *U. S.*, 156 Fed., 759.

Jurisdiction: United States Court for China

In several States, English statutes passed prior to July 4, 1776, have been held to be in force.

In other States, only statutes passed prior to 4 James I (1607) are considered as part of the common law. 6 Am. & Eng. Encyc., 278 (2nd ed.).

DAMAGES.

In *Beaulieu* v. *Great Northern Railway Company*, 112 N. W.

DAMAGES (Continued).

Rep., 353 (Dec. 27, 1907), the Supreme Court of Minnesota exhaustively reviews the subject of mental suffering as an element of damage in actions arising *ex delicto* and *ex contractu*, and cites the authorities *in extenso*. In this case the plaintiff's child died at Cass Lake, and was shipped over the road of the defendant company to Ogalmah, where it was to be buried. It was necessary to transfer the body to a connecting line at Erskine. The defendant, however, carried the body past this point, and as a result of the negligent act, the plans for the funeral were delayed and the plaintiff suffered great mental anguish. The Court *held*, that the acts complained of constituted a mere breach of contract, and not being accompanied by any independent, wilful tort by the defendant, the plaintiff was not entitled to recover except for nominal damages.

Mental Suffering in Tort and Contract

EQUITY.

The complainant had for years placed on the market under the trade name of "Enterprise," a machine and its parts on which the patent had expired. He had a general reputation as the manufacturer of other articles under that name. The defendants manufactured parts of the same machine and packed them in boxes similar to the complainant's marked: "Repair Parts of the Enterprise Meat Chopper" manufactured by the defendants. There were no *indicia* on the parts to show their origin. An injunction prohibiting the defendant from making or selling the articles without distinguishing them from the complainant's was refused; *Bender* v. *Enterprise Co.*, 156 Fed., 641.

Unfair Competition: Relief by Injunction Refused

Relief is granted where the machine is simulated and placed on the market with no differentiating marks. *Singer Mfg. Co.* v. *Just Mfg. Co.*, 163 U. S., 169. This is on the ground of the confusion caused among the public which results in a detriment to the plaintiff's established business. *Flagg Mfg. Co.* v. *Holway*, 178 Mass., 83.

In *Neostyle Mfg. Co.* v. *Ellan's Duplicator Co.*, 21 C. P. C., 185, an injunction was refused in a situation similar to the present. The case nearest in point in America is *Deering Harvesting Co.* v. *Whitman*, 91 Fed., 376, in which the parts were advertised and catalogued as manufactured by the complainant. It is needless to add the defendant was restrained.

EQUITY (Continued).

The Court in the present case refused a further extension of the above case for the reasons: (1) that the assumption ordinarily is not that the parts are manufactured by the maker of the machine itself; (2) that to grant the complainant's prayer in requiring the defendants distinctly to ear-mark their product would have a deterrent effect upon the trade in repair parts.

FIXTURES.

A wrongfully attached B's two-room frame dwelling house, which was then a chattel, to land belonging to A, and then conveyed the land and house to C, who had no notice of B's rights. *Held,* the house did not become a part of the realty as between B. and C. Supreme Court of Montana in *Eisenhauer* v. *Quinn,* 93 Pacific, 38.

Unlawful Attachment

Most of the cases concerning fixtures in which the rights of innocent purchasers have come in question, have been cases where the chattel has been attached with the consent of its owner under an agreement that it is to remain personalty. In these cases an innocent purchaser of the realty is permitted to retain the chattel against the owner. Bronson on Fixtures, 155 and cases cited. The contrary has been held, however; *Russell* v. *Richards,* 10 Me., 429.

The ground of the majority view is that the owner of the chattel has put it in the power of the owner of the realty to sell it with the land to an innocent purchaser; *Wicher* v. *Hill,* 115 Mich., 333; *Davenport* v. *Shants,* 43 Vt., 546.

The decision of the principal case where the attachment was made without the consent or fault of the owner seems in accordance with this principle.

HABEAS CORPUS.

In *ex parte Burden,* 25 Southern Reporter 1, the Supreme Court of Mississippi, granted a writ of *habeas corpus* to a prisoner who had been sentenced as for a felony, under a verdict of "assault and battery with intent to commit manslaughter," when there is no such crime known in the law, the words "with intent to commit manslaughter," which the trial Judge considered as indicating a felony, being mere surplusage.

Attacking Erroneous Judgment

See note page 255.

HOMICIDE.

B, boarding with C, placed a spring-gun in his trunk in such a manner as to kill C who, in curiosity and without right, sought to open the trunk, though warned by B as to the condition. *Held,* that one has no greater right to take life by indirect than by direct means under the same circumstances; that warning to C was no defence to the charge of murder unless it were brought home in such a way that her act was a deliberate attempt to take her own life; but if C was the only person who might rightfully go to the room, evidence of the warning is admissible as having a material bearing on the question of malice; that proof of the specific intent not to kill C is not admissible, since his intent was necessarily general until made specific by C's death, so evidence of his intent must be equally general; *State* v. *Marfaudille,* 93 Pac. (Wash.), 939.

Spring-Guns: Warning: Intent

On the question of notice, this case goes beyond that held in *United States* v. *Gilliam,* Fed. Cases No. 15205a, where it was *held,* that where notice is given, the sufferer is held to have brought the calamity on himself—to be his own executioner if life is lost. The other doctrines of the leading case are in line with the few cases which have arisen in America. Wharton on Homicides, 418, 553; *Simpson* v. *State,* 59 Ala. 1; *Gray* v. *Combs,* 7 J. J. Marsh, 428.

The old English common law on this subject as declared in *Ilott* v. *Wilkes,* 3 B. & Ald., 304, has not been adopted into the common law of this country. *State* v. *Moore,* 31 Conn., 479.

INNKEEPERS.

Plaintiff, stopping at the "Imperial Hotel," at a summer resort, and the rate being fixed by the week, but for no specified time, brings this action for property taken from her room. *Held,* that defendant proprietor was an innkeeper and liable to the plaintiff guest for any loss not induced by the latter's contributory negligence. *Holstein* v. *Phillips,* 59 S. E., 1037. The absolute liability of innkeepers for any loss not occasioned by the contributory negligence of the guest has long been settled. *Bac. Abr. Inns and Innkeepers C.* 4. That there is a difference between a boarding house and an inn and that the latter's proprietor is liable only for the

Boarding House Keepers: Distinction Between in Regard to Liability for Theft

INNKEEPERS (Continued).

losses occurring through his own negligence or that of his servants, is equally well established; *Parker* v. *Flint*, 12 Mod., 254. An inn may quarter one as a "boarder," and conversely a boarding house may quarter one as a "guest;" *Kister* v. *Hildebrand*, 9 B. Mon., 72, and in each case the liability of the proprietor is determined by the character of the resident. A place is not conclusively an inn because it is called "hotel;" *Bonner* v. *Welbron*, 7 Ga., 296; nor is it conclusively a boarding house because the charge is made by the week; *Betts* v. *Salisbury*, 12 Alb., L. J., 337. As the old reasons for holding innkeepers to such strict requirements have passed away, and as the trend of the law is to free them from the old liabilities, a case so closely on the line as the principal case might well have gone the other way.

NEGLIGENCE.

Highways: Liability of Persons Causing Obstructions

Defendant owned a pile of wood, one corner of which extended over the highway, though not the travelled portion, for about two feet, but there was left sufficient room in the highway for the ordinary use thereof. While plaintiff's wife was driving along the road, the horse became frightened by a train, and started to run. When the wood pile was reached, the buggy struck the part extending into the highway, and was overturned, and plaintiff was thrown with such violence as to cause her death.

There was held to be no error in the refusal of the Court to instruct the jury that, as a question of law, the fact that the wood pile was "off the main traveled portion of the highway and at a place where it was not dangerous to persons driving along said highway in the customary and ordinary manner," exculpated defendant from all blame and responsibility for the accident and its consequences; *Williams* v. *San Francisco & N. W. Ry. Co.*, 93 Pac., 122.

While the cases appear to be widely divergent upon the application of principles of law involved in the principal case, whatever apparent difference there may be in the conclusions reached is founded upon a distinction made clear by the Court, as follows: "And while, as between the town or county or public authorities having supervision of public highways and the traveler, the latter will leave the portion of the road laid

NEGLIGENCE (Continued).

out and prepared for the customary use and travel, and go upon and use the unprepared and customarily unused part at his own risk, he is nevertheless entitled to the unobstructed and uninterrupted use of the entire width of the highway as against the unlawful acts of other persons, either real or artificial."

In *Dickey* v. *Maine Telegraph Co.*, 46 Me., 485, it was *held:* "The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous to the traveler than in a state of nature, or than in the state in which the town has left it." In another case it was said, "It is a mistake to suppose the public rights of travel are restricted to the prepared and usually traveled path." *Johnson* v. *Whitfield,* 18 Me., 286; 36 Am. Dec., 721.

There is a well recognized rule that an owner of property abutting upon a road has a right temporarily to occupy a reasonable portion of the road with building materials, provided that sufficient room is left for the passage of persons traveling; *Palmer* v. *Silverthorn,* 32 Pa., 65. However, the justification of such actions lies in necessity, an element not present in the principal case; *Smith* v. *Simmons,* 103 Pa., 32.

Plaintiff was injured through the breaking of a "head-piece" of an elevator which his employer was renting from the defendant. Plaintiff sues defendant for damages. There was no proof that defendant was bound to inspect and repair the elevator or that he was under any obligation beyond that of furnishing an elevator safe and suitable for the purposes to which it was to be put. There was no evidence that the "head-piece" was defective or unsafe when installed. Recovery was allowed in the lower court. Scott, J., in reversing the decision because of error in instructions as to defendant's liability, said: "It was undoubtedly the defendant's duty in the first instance to furnish an elevator which was safe and suitable for the uses to which it was to be put," but, "beyond this, in the absence of a special agreement, it was under no obligation to inspect or repair." *Haigh* v. *Edelmeyer & Morgan Rod Elevator Co.,* 107 N. Y. Sup., 936.

Persons Liable: Liability of Lessor of Machinery

This statement seems to infer that, had a contract existed between the plaintiff's employer and the defendant, and there had been a breach of contract by the latter in not properly

NEGLIGENCE (Continued).

inspecting, the plaintiff could have recovered. This inference accords with the dictum of the early New York case of *King* v. *R. R.*, 66 N. Y., 181, decided in 1876, that, "If there was a duty resting upon the defendant (lessor) to keep the derrick in repair, so that it could be safely used, it may be conceded that the omission of this duty would give a right of action to the plaintiff (an employee of lessee) for an injury caused thereby," thus showing that in New York the question of the right of an employee of a lessee to recover from a lessor damages for injuries resulting from breach of contract to inspect and repair machinery entered into by the lessor with the lessee, is still an open one.

The general law is well established to the contrary, as laid down in the kell-known case of *Winterbottom* v. *Wright*, 10 M. & W., 107, and followed in the recent case of *Earl* v. *Lubbock*, 1 K. B., 253 (1905). These cases restrict the plaintiff's action, in such a case as this, to one against his employer, holding that the contract between his employer and the lessor does not entitle the employee of the lessee to an action against the lessor.

Master and Servant: Dangerous Premises: Duty of Master

Defendant, an operator of a stone quarry, was held liable in damages for personal injuries resulting from negligence in not properly inspecting the rocks blasted in the quarry so as to prevent danger from unexploded charges to workmen employed to reblast the rocks. The defendant pleaded assumption of risk. The evidence showed that it was the rule in quarries that the foreman should provide means by which all unexploded charges could be found—numbered—and exploded before the workmen employed to reblast the rocks should begin work. The plaintiff, being advised of this rule, worked in reliance upon it, and was injured by the explosion of a hidden charge. *Harper* v. *Iola Portland Cement Co.*, Sup. Ct. of Kansas, 93 Pac., 179.

This case accords directly with *Brick Co.* v. *Shanks*, 69 Kansas, 306, in holding that "The defendant expressly undertook to make the place where the plaintiff was required to work, safe by the adoption of the regulation described, and an implied agreement to assume the risk guarded by the regulation cannot be recognized."

POWERS OF POLICE DEPARTMENT.

Bertillion System of Measurement: Mandamus

The plaintiff was indicted for grand larceny and forgery, and while waiting in the district attorney's office for his arraignment and release on bail, was directed by the police department to submit to being photographed and having certain impressians and measments taken under the "Bertillion System." He afterwards was arraigned and released on bail and now seeks to regain such photograph and imprints by mandamus. Such were the facts in *Gow* v. *Bingham*, 107 N. Y. Suppl., 1011.

It was *held* that the act of the police department was unlawful as being a violation of the right of freedom and the inviolability of the person; that it was contrary to the provision of law that requires the arresting officer immediately to bring the offender before the nearest sitting magistrate; and that the act was not justified by the provision in the city charter that it was the duty of the police to "especially preserve the public peace, prevent crime and detect and arrest offenders," nor by the power of the police commissioner "to make such rules, orders and regulations" as may be reasonably necessary to effect a prompt and efficient exercise of all powers conferred upon him by law. See Sec. 51, Liedeman on State and Federal Constitution; *Joyce* v. *N. Y.*, 27 Misc. (N. Y.), 658, where the plaintiff had been convicted and where the police department was sustained; *Owne* v. *Partridge*, 40 Misc. (N. Y.), 415, same facts and decision as in preceding case, but it is intimated that the result might be different if the plaintiff had not been convicted; *State* v. *Clausmeirer*, 154 Ind., 599, holding that while a sheriff may take a photograph of a prisoner so that he might more readily capture him in case of escape, the sending of such picture to the police department of another city was a libel.

It was *held*, however, that although the defendants were liable to civil action of damages, or criminal prosecution for assault or libel, the plaintiff had no remedy by writ of mandamus, for "a writ of mandamus only lies to compel one to do what ought to be done in discharge of a public duty, and not to undo what is improperly done, even though it may be done under color of the performance of a public duty." See also, Merrill on Mandamus, Sec. 42; *ex parte*, Nast., 15 Q. B., 921; *Dental Society* v. *Jacobs*, 92 N. Y. Supp., 590.